APPEAL NO. 93343

On March 19, 1993, a contested case hearing was held in (city), Texas, with (haring officer) presiding. The record was held open until March 26, 1993, to allow the filing of memoranda by the attorneys for the parties. Thereafter, the hearing officer determined the sole issue in the case, the claimant's correct temporary income benefits (TIBS) rate, by ordering TIBS to be paid to the claimant, MI to the extent of the maximum weekly income benefit of $438.00 per week, for the period of disability or until claimant reached maximum medical improvement (MMI).

The carrier has appealed the hearing officer's determination to compute TIBS based upon 70% of the claimant's average weekly wage (AWW) derived from the employer, arguing that it is entitled to deduct the weekly earnings after an injury that were paid by a concurrent employer under Art. 8308-4.23(c). The claimant responds that only the wages paid by the same employer after an injury may be deducted from AWW to derive TIBS under Art. 8308-4.23(c). Both argue that Rule 129.4 supports their respective positions. Neither party complains of the lack of a factual record in this case.

DECISION

After reviewing the record and hearing officer's decision, we reverse and remand the case for development and consideration of evidence beyond the stipulations, and for application of the law discussed in this decision to the facts that are so developed.

This was approximately a 15 minute hearing. At the beginning of the hearing, the hearing officer announced and the parties affirmed the following stipulations:

1.On (date of injury), Claimant suffered a compensable injury while in the course and scope of his employment with [employer].

2.On (date of injury), [employer] had workers' compensation insurance coverage through Liberty Mutual Fire Insurance Company.

3.On (date of injury), Claimant lived within 75 miles of the El Paso Field Office of the Texas Workers' Compensation Commission.

Official notice was taken only of the laws and rules pertaining to workers' compensation.

After these stipulations, the claimant's attorney argued that the claimant at time of injury also worked for (school district), earning $621.88 per week, although he was unable to return to the employer, and that this amount should be used to compute his AWW, along with the wages paid by the employer. The claimant's attorney further indicated that claimant was working for the school district, and that his "weekly earnings after the injury" were $621.88. He proposed that this amount be deducted from the AWW derived from both concurrent employments. The hearing officer, noting that this prior statement was

"opening," observed that this was "not your usual-type hearing" and allowed carrier to open. Carrier urged that Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, was directly in point to preclude the relief claimant sought as to AWW. Some discussion ensued between the parties and hearing officer as to the dollar amount of the maximum weekly income benefit that would apply under Art. 8308-4.11 to whatever might be the time periods at hand.

The carrier submitted what was described on the tape recording as an affidavit from the school district, which it argued substantiated a post-injury weekly wage of $625.69. While the rustling of paper can be heard on the tape, the "affidavit" was not marked nor admitted into evidence, and is not shown in the hearing decision as an exhibit. The carrier's attorney said the affidavit had been in evidence in the "previous hearing." However, no official notice was taken of anything in the record of any other hearing and its relevance, if any, to this proceeding is unknown.

The claimant's attorney reviewed Appeal No. 91059, and stated that it appeared to be in point. He apologized for taking up the tribunal's time, stating that if he had seen it before, there might not have been a hearing. He requested a chance to evaluate it and respond. The hearing officer held the record open for the filing of memoranda from both parties.

Claimant's memorandum withdrew the argument made at the contested case hearing, and substituted an argument that Article 8308-4.23 does not support subtraction of the wages from a second job from the AWW. This memoranda asserts that carrier, as a result of a December 14, 1992, ruling of the hearing officer, had paid a lump sum of $5,679.93, which it asserts was incorrect. Claimant argued that TIBS must be calculated by "exclusive" reference to wages earned at the job where the injury was suffered. The carrier responded that this is not a true reading of Art. 8308-4.23(c), noting that other provisions in the law, such as Art. 8308-4.23(f) regarding bona fide employment, or Art. 8308-4.28 regarding supplemental income benefits, clearly show that earnings after an injury which may be taken into account to calculate TIBS are not restricted solely to those paid by the employer where the injury was sustained. Neither memoranda submitted additional evidence.

Notwithstanding the clear lack of any facts other than the three stipulations, the hearing officer made findings of fact regarding the claimant's inability to work for employer, his continued employment with the school district, that the school district wages were a supplement and not replacement of, wages from the employer, and a finding as to the dollar amount of the AWW for employer. The hearing officer also found, as fact, that "temporary income benefits are intended as a wage replacement for injured workers."

In addition to a conclusion of law regarding jurisdiction and venue, the hearing officer

also concluded: "Seventy percent of claimant's average weekly wage of $789.00 is $552.30; and, because this is more than the maximum temporary income benefit allowed under the law, claimant's correct temporary income benefit rate is $438.00." Official notice was not taken, however, regarding the maximum weekly benefit that would apply in this case, and the period of time covered by the lump sum payment is unknown. The legal basis for not applying the formula directed in Art. 8308-4.23(c) for calculation of TIBS was not set forth. One may surmise, however, from the discussion contained in the decision, that the hearing officer concluded that applicable weekly earnings after the injury were "zero" because (one supposes without benefit of factual underpinning in the record) claimant did not derive post-injury earnings from his employer, and those paid by the school district were disallowed.

Development of Evidence

The reason for remand will be discussed first. The hearing officer was subject to the statutory duty to "ensure . . . the full development of facts required for the determinations to be made." Art. 8038-6.34(b). Although that provision also authorizes the use of summary procedures (such as stipulations as to facts), we cannot agree that this empowers the hearing officer to take argument from counsel as fact or to work from memory of a record developed at another proceeding. Facts should be stipulated or otherwise developed that are sufficient to support the awarded benefits.

Whether Wages From a Concurrent Employment Which Are Not Used to Compute AWW May be Deducted From the AWW Under Art. 8308-4.23(c).

The Appeals Panel has determined, in Appeal No. 91059, that the 1989 Act substantively changed Art. 8308-4.10, the basis for computation of the AWW. In that Appeals Panel opinion, we held that the statute directed computation of AWW based solely upon the wages earned from the employer in whose service the injury was sustained. Wages earned in a concurrent employment held on the date of injury are disregarded for purposes of computing AWW.

We do not agree with the claimant that Art. 8308-4.23 restricts any deduction from AWW for purposes of computing TIBS to wages earned only from the employer in whose service the claimant was injured; this extremely narrow reading of that statute would effectively eliminate the clear intent of the 1989 Act to provide TIBS until an employee (who has not reached MMI) returns to work at wages "equivalent to" those earned prior to the injury, whether or not from the same employer. Nevertheless, having interpreted the AWW provisions as indicating legislative intent to disregard wage from a concurrent employment,

we are not at liberty now to find a contrary intent for purposes of Art. 8308- 4.23(c).[1] The Government Code directs that construction of statutory intent must be done to effectuate the entire statute, in a manner which presumes a just and reasonable result. V.T.C.A. Government Code § 311.021 (Vernon 1988). Absent Commission rules offering guidance on how concurrent wages should be considered, we will interpret the 1989 Act as an integrated whole. We conclude that if concurrent wages earned from an employment held on the date of injury are not used to compute AWW, then it would be inconsistent to allow such concurrent wages to be deducted as weekly earnings after an injury under Article 8308-4.23(c) or (d).[2]

Although the result reached by the hearing officer is consistent with our view of the law, we cannot simply affirm the hearing officer's computation method reflected in Conclusion of Law No. 2, which bases the TIBS calculation on a percentage of the AWW. There is no provision in the 1989 Act which sets forth this formula. It is a percentage of the difference between AWW and weekly earnings after the injury upon which TIBS is based, subject to the minimum and maximum benefit. And as discussed above, there is a dearth of facts upon which to base any of the specific dollar amounts and facts noted in the decision.

We reverse and remand the case for development of the evidence and consideration consistent with this opinion.

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[1] We do not regard Texas Workers' Compensation Commission Appeal No. 92584, decided December 14, 1992, as instructive in this case because it dealt with the issue of whether distribution of profits from a partnership could be considered as "wages."

[2] We note that this opinion would not preclude some deduction being made for post-injury wages paid by a concurrent employer if the contract of employment changes after the date of injury, for example, if part-time concurrent employment became full-time. Whether or not there may be similar facts here is unknown due to the lack of a fully developed record in this case.

A final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge